



# MOA sElement 5

**COMPLIANCE WITH  
FEDERAL DISABILITY NONDISCRIMINATION LAWS**

## AGENDA

- **Presentation:** Review of Learning Objectives
- **Presentation:** General Principles Unifying Federal Disability Nondiscrimination Laws
- **Presentation:** Defining the Term “Disability”
- **Presentation:** Discrimination Prohibitions
- **Presentation:** Accessibility and Accommodation
- **Activity I:** Discrimination / Accommodation /Accessibility?
- **Presentation:** Communications
- **Presentation:** Employment Practices and Employment-Related Training Participation
- **Presentation:** Supporting Documentation: Compliance with Federal Disability Nondiscrimination Laws
- **Presentation:** State’s Implementation of MOA Requirements Related to Compliance with Federal Disability Nondiscrimination Laws

## **LEARNING OBJECTIVES**

- The participant will be able to explain the disability-related requirements of 29 CFR part 38, the regulations implementing Section 188 of WIOA, and the requirements of Subparts B and C of 29 CFR part 32, the regulations implementing Section 504 of the Rehabilitation Act of 1973.
- The participant will be able to describe how the State guarantees that compliance with these disability-related requirements will be achieved.
- The participant will be able to describe lawful and appropriate methods and practices for providing services to individuals with disabilities.
- The participant will be able to identify what documentation CRC will accept as demonstrating compliance with these disability-related requirements.

## GENERAL PRINCIPLES UNIFYING FEDERAL DISABILITY NONDISCRIMINATION LAWS

The **overarching principle** of Federal disability nondiscrimination law is that people with disabilities must be treated **as individuals**, not on the basis of assumptions and stereotypes about their disabilities.

Under this principle, recipients are required to focus on the **skills, strengths and abilities** of a particular customer or employee with a disability, and to provide the reasonable accommodations / modifications, and the auxiliary aids and services, the customer or employee needs in order to utilize those skills, strengths, and abilities. Recipients should *not* focus on the limitations caused by the customer's or employee's disability.

### Laws Providing the Legal Framework for Serving Individuals with Disabilities in the One-Stop System

It is important to understand that *each* of the laws discussed below affects every WIOA Title I recipient in some way. In addition, *several* of these laws will be applicable *at the same time* to any given program or activity. Although the terminology used by these laws is not identical, the general principles that apply under the laws are consistent.

- **The Workforce Innovation & Opportunity Act (WIOA)** reformed the nation's job training system in a number of ways. In particular, WIOA required that States and local areas receiving financial assistance under the Act offer a range of different job training, education, and other human resource programs through the One-Stop Career Center system.
  - **Section 188 of WIOA** bars discrimination on the basis of disability in programs and activities offering aid, benefits, services, or training, as well as in employment. The section also covers the application process for any of these. Under the regulations implementing Section 188, persons with disabilities must also be provided with reasonable accommodations and modifications for their disabilities. In addition, the regulations require that individuals with disabilities be

- given services alongside (not segregated from) people without disabilities, unless the program or activity providing services performs an individualized assessment of a particular individual with a disability and concludes that the individual needs special, segregated services.
- The regulations implementing WIOA Section 188 are published at 29 CFR part 38.
  - **The Rehabilitation Act of 1973 (the Rehabilitation Act)** was the first Federal law to specifically forbid discrimination on the basis of disability. Different sections of the Rehabilitation Act apply in different circumstances; for example, certain sections of the Act apply to the Federal government, and others apply to entities that receive Federal financial assistance. Later laws, specifically the Americans with Disabilities Act of 1990 (the ADA), built upon the foundation laid by this Act. Although the Rehabilitation Act has been amended a number of times since 1973, its underlying principles remain the same.
    - **Section 504 of the Rehabilitation Act, as amended**, is the section that is most relevant to the One-Stop system. Section 504 prohibits any program or activity that receives Federal financial assistance (including programs or activities established or carried out by State or local governments or private entities) from discriminating against qualified persons with disabilities. This section also applies to programs and activities conducted by Federal Executive agencies or by the U.S. Postal Service.
    - DOL's regulations implementing Section 504 are published at 29 CFR part 32.

**A NOTE ABOUT TERMINOLOGY:  
“HANDICAPPED” VS. “INDIVIDUAL (OR PERSON) WITH A  
DISABILITY”**

As the 21<sup>st</sup> century begins, the term “handicapped” is regarded as a negative term that should not be used. However, in the early 1970s, the term was used commonly to refer to people with disabilities, and in fact was employed

by Congress throughout the original version of the 1973 Rehabilitation Act. The Department of Labor's regulations implementing Section 504 of the Act, which were published in 1974, also use the term "handicapped." These regulations have not yet been amended to correct the use of this term; DOL plans a major revision of the regulations in the near future. The use of "handicapped" in the regulations should not be considered an endorsement of the term, and it should be replaced by "person with disabilities" or similar "people-first" terms wherever possible.

- **The Americans with Disabilities Act of 1990 (ADA)** is the disability-related law with which many Americans are most familiar. The ADA is better known than other disability-related laws because it applies to a far broader range of persons, organizations, and businesses than any laws that preceded or have followed it.

The ADA prohibits discrimination on the basis of disability in these major areas: employment; State and local government; public accommodations, commercial facilities, and transportation; and telecommunications.

- **Title I of the ADA** contains the Act's employment-related provisions. It applies to State and local governments in their relationships with their own employees and applicants for employment, as well as to all private employers with 15 or more employees; labor unions; joint labor-management committees; and employment agencies.

Some One-Stop Career Centers regularly conduct activities similar to those provided by employment agencies -- for example, referring customers to jobs, or contacting employers to inquire about openings. Where those activities constitute a principal part of a Center's activities, or the activities of a particular program provided through the One-Stop system, the Center or program falls under the legal definition of "employment agency," and therefore the services that it provides to customers are covered by Title I of the ADA as well.

Title I forbids discrimination against qualified persons with disabilities in recruitment, referral, hiring, promotions, training, pay, social activities, and other “privileges of employment.” It also requires those covered to make reasonable accommodations for the known disabilities of qualified people.

- **Title II of the ADA** prohibits disability-based discrimination by public entities, including State and local governments, and any of their departments, agencies or instrumentalities, whether or not they receive Federal financial assistance. This Title applies to most WIOA Title I recipients and the programs and activities they offer. It bars discrimination against qualified persons with disabilities, and requires covered entities to modify their policies, practices, and procedures where necessary to avoid such discrimination and provide equal opportunity.

## WHO IS PROTECTED FROM DISCRIMINATION UNDER FEDERAL DISABILITY NONDISCRIMINATION LAWS?

Disability-based discrimination takes three basic forms:

- Discrimination based on a person's *actual, current* disability or disabilities
- Discrimination based on the *record* of a person's *past disability* (even though the person has recovered from the disability or no longer experiences its effects)
- Discrimination based on the *incorrect perception* that a person has a disability

In order to provide protection from all three of these types of discrimination, Federal disability nondiscrimination laws use the following standard, three-part definition for the term “*disability*”:

- A *physical or mental impairment* that *substantially limits* one or more of a person's *major life activities*;
- A *record* of such an impairment; or
- Being *regarded* [by a program, activity, training provider, employer, or other person or entity covered by the law] *as* having such an impairment.

So an “individual with a disability,” under Federal disability nondiscrimination law, means someone who falls under one of these three categories. The next part of the training will examine each of those categories in detail. A later part of this chapter will discuss exceptions to the definition of “individual with a disability.”

## **CATEGORY ONE: IS THE INDIVIDUAL A PERSON WITH AN ACTUAL, CURRENT DISABILITY?**

To determine if Federal disability nondiscrimination laws protect a particular person from discrimination under the first category (a person with an actual, current disability), ask the following three questions:

- Does the person have a physical or mental impairment?
- Does the impairment affect one or more of his/her major life activities?
- Is the effect a substantial limitation?

A full understanding of the meaning of the term disability requires an understanding of what is meant by physical or mental impairment, major life activities, and substantially limits. Let's review each of these important terms.



### **TERM TO KNOW – “PHYSICAL OR MENTAL IMPAIRMENT”**

The definition of this term in the WIOA nondiscrimination regulations (see 29 CFR 38.4) is consistent with the definitions in other Federal disability nondiscrimination regulations.

The definition has two parts. The first part covers physiological impairments, defining them as follows:

Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems:

- neurological
- musculoskeletal
- special sense organs
- respiratory (including speech organs)
- cardiovascular
- reproductive
- digestive
- genitourinary
- hemic and lymphatic

- skin
- endocrine

29 CFR 38.4, definition of “disability,” paragraph (1)(i)(A).

The second part of the definition covers

Any mental or psychological disorder, such as:

- mental retardation
- organic brain syndrome
- emotional or mental illness
- specific learning disabilities

29 CFR 38.4, definition of “disability,” paragraph (1)(i)(B).

The third part of the definition contains the following list of examples:

- Various types of impairments:
  - orthopedic
  - visual
  - speech
  - hearing
- Cerebral palsy
- Epilepsy
- Muscular dystrophy
- Multiple sclerosis
- Cancer
- Heart disease
- Diabetes
- Mental retardation
- Emotional illness
- Specific learning disabilities
- HIV
- Tuberculosis
- Drug addiction
- Alcoholism

The definition specifies that this is not an exclusive list, and that other

conditions may also be considered impairments.

The definition also specifies that homosexuality and bisexuality are not considered impairments.



### **TERM TO KNOW – “MAJOR LIFE ACTIVITY”**

There is no exhaustive list of major life activities; the activities affected by physical or mental impairments differ from person to person. However, within the last few years, the Supreme Court has clarified that a “major life activity” must be “of central importance to daily life.”

The WIOA nondiscrimination regulations, and other regulations implementing Federal disability nondiscrimination laws, provide some examples of major life activities. These examples include such functions as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning.

The regulations also include “working” as an example of a “major life activity.” However, the Supreme Court has questioned whether “working” should be listed in this category. Until the Court issues a definitive ruling on the issue, it is best to look at other “major life activities” to determine whether a particular person has a disability.

In various cases, courts and Federal agencies have also recognized other functions that are not listed in the regulations, such as concentrating, interacting with others, sleeping, and reproducing, as major life activities.



### **TERM TO KNOW – “SUBSTANTIAL LIMITATION”**

Not every impairment affects a person’s life so much that it (the impairment) is considered a disability under Federal disability nondiscrimination law. In order to qualify, an impairment (or

combination of impairments) must *substantially limit* one or more of the person's *major life activities*.

Some impairments may be disabling for particular persons but not for others, depending on the stage of the illness or disorder, the presence of other impairments that combine to substantially limit the person's major life activities, or any number of other factors. As with most determinations involving persons with disabilities or potential disabilities, generally the determination whether a person with one or more impairments is substantially limited should be made on a case-by-case basis, by someone with expertise in the field.

The regulations implementing various Federal disability nondiscrimination laws define the term “substantially limits” in different ways; there is no hard-and-fast rule under any of these definitions. In general, however, the term means that an impairment either:

- Prevents the person from performing a major life activity that the average person can perform, or
- Significantly restricts the person in performing such an activity (as compared to the average person).

**Significant restriction.** What constitutes a “significant restriction”? Again, there are no hard-and-fast rules. In general, however, you should look at whether, and if so how much, the impairment restricts:

- the *conditions under which* the person can perform the activity
- the *manner (way)* in which s/he can perform the activity
- the *duration (length of time)* for which s/he can perform the activity

**Mitigating measures.** The Supreme Court ruled in 1999 that in determining whether an impairment substantially limits a person's major life activities, the effects of any “mitigating measures” must be taken into consideration. For example, in deciding whether a person's visual impairments substantially limit her major life activity of

seeing, you must consider how well her vision can be corrected with eyeglasses or contact lenses.

*Mitigating measures* may include medication; devices such as crutches, prostheses, hearing aids, or glasses; or anything else that *mitigates* (lessens) the effect that a particular impairment has on a person's ability to perform major life activities.

It is important to keep in mind that in determining the impact of a *mitigating measure* on a particular person, you must consider both the *positive* and *negative* effects that the measure may have on the person's ability to function.

If you have any question about whether a person's impairment substantially limits his or her major life activities, consult your supervisor, or your program's equal opportunity officer or attorney.

## **CATEGORY TWO: IS THE INDIVIDUAL A PERSON WITH A RECORD OF A DISABILITY?**

The second category of people who are protected from discrimination under Federal disability nondiscrimination laws are people who have a *record of a past disability*, but who have recovered from, or who no longer have, that disability. This aspect of the law reflects the desire of Congress and the Executive Branch to protect such people -- such as cancer survivors -- from the effects of unfounded fears and unfair stereotypes that may be associated with their past impairments.

A person is considered to have a *record of a disability*, and therefore to fall within the second part of the definition of "disability," if s/he either:

- Has a past history of a *genuine* disability, or
- Has been *misclassified* as having a disability.

Keep in mind that in order for a person to be protected from discrimination under this part of the definition, the past impairment (or the impairment that

the person has been misclassified as having) must meet the three-part definition of an *actual disability*:

- The impairment that has been recorded must fall within the legal definition of a *physical or mental impairment*.
- The recorded impairment must be one that affects one or more *major life activities*.
- The recorded impairment must have *substantially limited* the person's major life activities (or, in the case of a misclassification, be an impairment that would have substantially limited those activities if the impairment had actually existed).

### **CATEGORY THREE: IS THE INDIVIDUAL REGARDED AS A PERSON WITH A DISABILITY?**

Category Three includes people who are protected by Federal disability nondiscrimination law solely because of how other people view them. This category includes two groups of people who actually have impairments that qualify as “physical or mental impairments” under the legal definition. It also includes a third group, of people who do not have actual impairments at all.

The first group includes people who have impairments that are not genuinely substantially limiting, but that other people mistakenly believe are substantially limiting.

The second group includes people whose impairments are substantially limiting solely because of other people's attitudes toward their impairments.

The third group of people protected under Category Three includes people who do not have impairments at all, but who are *perceived (regarded) by others* as having substantially limiting impairments, and who are subjected to discrimination -- by a program, activity, training provider, employer, or other person or entity covered by the law -- because of that perception.

## **“EQUAL OPPORTUNITY” AND CATEGORIES TWO AND THREE**

People who fall under any of the three categories in the definition of “disability” are protected from *discrimination* under WIOA Section 188 and other Federal disability nondiscrimination laws. However, people in Categories Two and Three -- those who have a record of a past disability, and those who are regarded as having a disability -- are *not* entitled to benefit from the types of positive actions, such as reasonable accommodations / modifications, which are designed to provide *equal opportunity* for people with disabilities.

These positive actions are intended to help people with disabilities succeed in employment despite the barriers imposed by their substantially limiting impairments. Because people in Categories Two and Three do not have such substantially limiting impairments, they presumably do not need -- and Federal disability nondiscrimination laws do not entitle them to -- the additional assistance that reasonable accommodations/modifications, auxiliary aids and services, and programmatic / architectural accessibility requirements are meant to provide. (All of these types of positive actions will be discussed later in this training.)

## **EXCEPTIONS TO THE DEFINITION OF “INDIVIDUAL WITH A DISABILITY”**

Federal laws barring discrimination on the basis of disability contain several exceptions to the definition of “individual with a disability.” These exceptions mean that people who have certain conditions, or who engage in certain activities, are not protected from adverse actions that are motivated by those conditions or activities, even if those actions would otherwise be considered discriminatory.

The WIOA nondiscrimination regulations contain two types of exceptions to the definition of “individual with a disability”: exceptions that apply in all aspects of the One-Stop Career Center system, and exceptions that apply only in the employment context.

### **Exceptions That Apply In All Contexts**

*Sexual and psychological disorders.* The regulations exclude persons with specific, listed sexual and psychological disorders. The list of sexual disorders includes transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders. Listed psychological disorders include compulsive gambling, kleptomania, and pyromania.

*Current illegal use of drugs.* The WIOA nondiscrimination regulations also exclude from the definition of “individual with a disability” both persons who are “currently engaging in the illegal use of drugs,” and persons with “[p]sychoactive substance use disorders resulting from current illegal use of drugs.” Recipients are permitted to take adverse actions against such people on the basis of their current illegal drug use.



### **TERM TO KNOW – “CURRENT ILLEGAL USE OF DRUGS”**

“Illegal use of drugs” is not the same as “use of *illegal drugs*.” Drugs that are lawful in some contexts, such as prescription drugs, may be used in an illegal or unlawful way. The term “illegal use of drugs” is intended to cover such use of otherwise-legal drugs, as well as use of drugs whose use is generally prohibited.

The WIOA nondiscrimination regulations define “illegal use of drugs” as “the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812).” The regulations note that the term “does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.” 29 CFR 38.4.

The regulations implementing Title II of the ADA define “current illegal use of drugs” as “illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.” 28 CFR 35.104.

It is important to note that only people who are *currently* using drugs illegally are excluded from protection under WIOA Section 188 and other relevant Federal laws. The following categories of persons *are* considered individuals with disabilities under those laws, and are therefore protected from discrimination on the basis of their past drug use (if that use qualified as a “disability” under the criteria described earlier in this training):

- Persons who have successfully completed a supervised drug rehabilitation program (an in-patient, out-patient, or employee assistance program), and who are no longer using drugs illegally;
- Persons who have been rehabilitated successfully in some other way (e.g., recognized self-help programs such as Narcotics Anonymous), and who are no longer using drugs illegally; and
- Persons who are currently participating in a supervised rehabilitation program, and who are no longer using drugs illegally.

Persons who are not using drugs illegally, but who are mistakenly believed to be doing so, are also protected from discrimination under the WIOA nondiscrimination regulations.

To ensure that a person’s past drug use is not recurring, a recipient may request evidence that the person is participating in a rehabilitation program or has been rehabilitated successfully in some other way, or may request the results of a drug test.

- In certain circumstances, even persons who are *currently* using drugs illegally are protected from discrimination, if their use constitutes an addiction (impairment) that substantially limit their major life activities.

## **EXCEPTIONS THAT APPLY ONLY IN THE EMPLOYMENT CONTEXT**

In the employment context, a person is excluded from the definition of “individual with a disability” if that person either:

- is *currently* abusing alcohol, or
- has a currently contagious disease or infection,

if that alcohol abuse or disease/infection *either*:

- prevents him/her from performing the duties of the job in question, or
- makes his or her employment a *direct threat* to health and safety.

The WIOA nondiscrimination regulations do not define the term “direct threat.” However, in the employment context, the regulations implementing Title I of the ADA apply. These regulations, published by the Equal Employment Opportunity Commission (EEOC), define “direct threat” as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 CFR 1630.2(r). Under this definition, the factors that must be considered in determining whether a particular person’s employment would create a *direct threat* include:

- the duration (length of time) during which the person’s employment would create the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

The EEOC’s Interpretive Guidance on Title I of the ADA, found in the Appendix to 29 CFR part 1630, explains the concept of “direct threat” in more detail than is possible in this training.

## **ALCOHOLICS AND PROVISION OF BENEFITS/SERVICES**

In the context of provision of benefits and services (as opposed to that of employment), alcoholics (those whose use of alcohol constitutes an *impairment* that *substantially limits* one or more of their *major life activities*) are treated differently by Federal disability nondiscrimination laws than people who are currently using drugs illegally. Alcoholics—even those who are currently using alcohol—are protected from discrimination in programs and activities that provide benefits or services through the One-Stop delivery system. An otherwise-qualified alcoholic cannot lawfully be denied benefits or services because of *the alcoholism itself*. However, a recipient is permitted to take adverse action against an alcoholic because of the *behavior that the alcoholism causes*.

## WHEN IS A PERSON WITH A DISABILITY “QUALIFIED”?

The civil rights protections discussed in this training do not apply to every person with a disability; only *qualified* individuals with disabilities are entitled to those protections.

Under the WIOA nondiscrimination regulations and other Federal disability nondiscrimination laws, the definition of a “qualified individual with a disability” that applies to a particular person depends on the context.

In the context of **provision of aid, benefits, and services**, a “qualified individual with a disability” is someone who meets the *essential eligibility requirements* for the program or activity. In deciding whether a particular person meets these requirements, you *must* consider any *reasonable accommodation* or *reasonable modification* that can be made for the person’s disability. (*Reasonable accommodations* and *reasonable modifications* will be discussed later in this training.) However, you must *not* consider architectural, communication, or transportation barriers to the person’s participation.

In deciding whether a person with a disability that affects his/her communication abilities meets the *essential eligibility requirements* for a program or activity, you must assume that *auxiliary aids and services* will be provided. (“*Auxiliary aids and services*” is a general term used to describe methods of effective communication with people with various types of disabilities.)

In the **employment** context, a “qualified individual with a disability” is a person who meets the job-related requirements imposed by a *particular employer* for a *particular job* -- such as skill, experience, or education -- and who is able to perform the *essential functions* of that *specific job*. In deciding whether a person with a disability is qualified for a specific job, you must consider whether *reasonable accommodations* for his/her disability will enable him/her to perform those essential functions, and assume that *auxiliary aids and services* will be provided.

**Job training programs** fall into a different category, because they combine aspects of both employment and services. The regulations interpreting different Federal disability nondiscrimination laws apply varying definitions of “qualified individual with a disability” to such programs. The WIOA

nondiscrimination regulations use the same definition as for programs and services (in other words, the person with a disability must meet the *essential eligibility requirements* for the training program). Under DOL's Section 504 regulations, a person with a disability is "qualified" if (with *reasonable accommodations*) s/he meets both the eligibility requirements for participation in the program and the valid job or training qualifications.

If you have a question about whether a particular person with a disability is qualified for a job training program, consult your supervisor, or your program's equal opportunity officer or attorney, to find which definition applies to your program or activity.

## DISCRIMINATION PROHIBITIONS

The following are *some* of the types of actions that are considered discriminatory under the disability laws previously discussed. It is impossible to list every single action that violates these law because it discriminates against one or more persons with disabilities. However, the regulations implementing WIOA Section 188 and other statutes barring disability-based discrimination do provide general descriptions of the types of actions that are considered discriminatory. The following summary does *not* include all of the requirements of, and should not be used as a substitute for, the statutes and regulations themselves.

It is important to note that the actions listed below are discriminatory and unlawful, even if the person(s) who take the actions are well-intentioned and do not mean to discriminate. *It is the actions themselves, not the intent behind them, that constitute discrimination.*

Examples of discriminatory actions include the following (32 CFR 32.26 and 29 CFR 38.6):

- Denying a qualified individual with a disability the opportunity to participate in, or benefit from, a WIOA activity because of their disability

- Failing to give a qualified person with a disability an equal opportunity to get the same results or benefits from a program or activity that people without disabilities receive
- Charging a particular person with a disability, or any group of persons with disabilities, any extra fees to cover the costs of accommodating the disability or of providing the nondiscriminatory treatment required by law
- Excluding, or otherwise discriminating against, any person or entity because that person or entity is known to associate, or have a relationship, with someone who has a known disability.

### **ACTIONS THAT ARE NOT DISCRIMINATORY**

Some people mistakenly believe that the following actions are discriminatory. However, the WIOA nondiscrimination regulations specifically state that these actions are allowable and lawful.

- The regulations do not require you to provide people with disabilities with any of the following items or services:
  - Personal devices, such as wheelchairs;
  - Individually prescribed devices, such as prescription eyeglasses or hearing aids;
  - Readers for personal use and study (as opposed to help with filling out forms or reading other documents related to the program or activity you provide); or
  - Services of a personal nature, such as assistance with eating, toileting, or dressing.
- However, you may be required to provide, as **reasonable accommodations**, items that might otherwise be considered personal, if those items are specifically designed or required to meet needs that are job-related or program-related, rather than personal needs.
- Also, it is not against the law for a recipient to provide people with disabilities with *additional* services or benefits *beyond* those that are required by law.

- If a Federal statute or Executive Order specifies that a particular program or activity is limited to persons in special categories, you are not required to admit persons with disabilities to the program or activity if they do not fit in those categories.
  - For example, if a Federal statute or Executive Order designates a particular program as being for blind persons or those with visual impairments, you are not required to admit a person who is deaf, but who does not have a visual impairment.

## ACCESSIBILITY AND ACCOMMODATION

### Accessibility

Providing **accessibility** (or, to use a related term, providing **access**) for people with disabilities means that WIOA recipients must both *plan ahead* and *act ahead*. People with many different types of disabilities will need and want to apply to WIOA programs, use computers provided by One-Stop centers, participate in job readiness activities, and take advantage of every other service and benefit that is available. To satisfy the obligation to provide *access*, recipients must not wait for a person with a disability to ask to participate in a program or receive a service. Instead, they must plan for and take a wide range of generalized actions *in advance* to be ready to provide effective services.

There are two types of accessibility that must be considered when planning for services to individuals with disabilities.

**Architectural accessibility** is the term that most people consider when thinking of accessibility. It is the physical modification of a recipient's facilities to accommodate use by individuals with disabilities.

The term "facilities" is frequently interpreted to mean "buildings." But the term actually includes not only buildings, and the rooms and other areas within them; it also includes indoor constructs such as computer kiosks and office cubicles, as well as equipment; vehicles and other "conveyances"; parking lots and walkways; and other similar examples. See the definition of "facility" in 29 CFR 38.4. In addition, the law dealing with architectural accessibility provides

standards for such related, but often overlooked, items as alarm systems and signs.

The level of architectural accessibility that a particular facility must meet depends on a number of factors:

- The *age* of the facility (when it was built)
- Whether the facility has been, or will be, *altered or renovated* for the recipient's use
  - If so, *the date when* the facility was / will be altered or renovated
- The date when the recipient first received Federal financial assistance

Under the hierarchy of accessibility, facilities that are newly constructed must meet the highest standards of accessibility. The standards that apply to facilities that have been altered or renovated depend on whether the alteration or renovation was accomplished for the recipient's use, and, if so, the dates of the alteration/renovation and of the recipient's first receipt of Federal financial assistance. The lowest standards of accessibility apply to "existing facilities."

*New construction.* Facilities that are newly constructed must, at a minimum, meet the Uniform Federal Accessibility Standards (UFAS), found at 41 CFR 101-19.6, Appendix A. DOL's Section 504 regulations permit a recipient to adopt "alternative standards" for architectural accessibility if it is clear that the alternative standards provide equal or greater access for people with disabilities. Such "alternative standards" include the Americans with Disabilities Act Accessibility Guidelines (ADAAG), 28 CFR part 36, Appendix A. They also include the new ADA and ABA Accessibility Guidelines for Buildings and Facilities, published by the U.S. Access Board in the Federal Register on July 23, 2004. The latter Guidelines are available at <http://www.access-board.gov/ada-aba/Blue%20HTML/ADA-ABA%20Guidelines%20Blue.htm>. A State's accessibility standards may also be used if those standards meet, or exceed, the requirements of UFAS.

*Alteration or renovation.* The standards that apply to a facility that has been altered or renovated depend upon the following factors:

*The purpose or initiator of the alteration/renovation. Was the alteration/renovation done:*

- By the recipient?
- On the recipient's behalf?
- For the recipient's use?

*If the answer to all of these questions is “no,” the standards for existing facilities apply to the altered or renovated facility. (We will discuss these standards shortly.)*

*If the answer to one or more questions is “yes,” the standards that apply depend on two dates: the date when the alteration was or will be accomplished, and the date when the recipient first received Federal financial assistance.*

- *If the alteration or renovation was/will be accomplished before the recipient first received Federal financial assistance, the standards for existing facilities apply.*
- *If the alteration or renovation was/will be accomplished after the recipient first received Federal financial assistance, the altered/renovated part of the facility must comply with UFAS or other comparable standards “to the maximum extent feasible.”*

*Existing facilities.* Facilities that do not meet the above criteria for either new construction or alteration/renovation must meet the requirements related to **program accessibility**.

**Program accessibility** means that a recipient must set up each of its programs and activities in advance to be accessible to qualified persons with disabilities *when looked at as a whole*. This requirement does not mean that every facility (as described above) used by a program or activity, or every part of such a facility, must be physically accessible to and usable by qualified people with disabilities. However, if a particular program or activity is offered at only one site, that site must be made accessible, or the program or activity must be made available at an alternative, accessible site or sites. In addition, every aspect of a program or activity (such as intake, assessment, or training) must be accessible.

Under the program accessibility requirements, a recipient is not obligated to make structural changes to its facility if other ways of providing access for people with disabilities (such as redesigning equipment, moving classes or other services to accessible locations, or assigning aides to work with customers with disabilities) are possible. However, two specific legal requirements will affect the feasibility and legality of such alternative arrangements:

- Every recipient must provide programs and activities to people with disabilities in the most integrated setting possible (see Element 5.4); and
- A recipient may be required to alter or renovate its facilities if there is no other possible way of providing program accessibility.

### **Accommodations and Modifications**

In contrast to **accessibility** (which refers to *generalized* actions that must be taken *before* any person with a disability approaches a recipient), the terms **reasonable accommodation** and **reasonable modifications** refer to actions a recipient must take *at the time that a particular person* with a known disability seeks to apply to or participate in a program or activity, based on that person's *individual* needs. The actions that the recipient must take are those that will enable that particular person to receive equal benefits from the program or activity, or to compete fairly in educational and work settings -- in other words, to provide *equal opportunity* for the person with a disability.

### **Circumstances Under Which A Recipient Must Provide An Accommodation or Modification**

To request an accommodation or modification, a person with a disability does not need to mention the word “disability,” refer to the law, or use the phrase “reasonable accommodation” or “reasonable modification.” All s/he needs to do, either personally or through a representative, is let the recipient know that s/he needs an adjustment or change for a medical reason.

Once a recipient receives a request for **reasonable accommodations** or **modifications**, the recipient must engage in an informal, interactive process with the person making the request, to identify how the disability limits the

person's major life activities, and what **accommodations** or **modifications** are possible and may be helpful. As part of that process, the recipient may ask for medical documentation of the disability, or ask other relevant questions about the disability that will enable the recipient to make an informed decision about the request.

The fact that a recipient has provided **accessibility** for people with disabilities in general does not excuse it from providing **reasonable accommodations** or **modifications** for a particular person with a disability.

As noted earlier in this training, only people with actual, current disabilities are entitled to **reasonable accommodations** or **modifications**. A recipient is not required to provide an accommodation or modification for a person with a record of a past disability, or a person who is regarded as having a disability.

The EEOC's *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* may help explain these concepts, particularly as applied in the employment context. This guidance is available on the EEOC's website at <http://www.eeoc.gov/docs/accommodation.html>, or may be obtained from EEOC by calling (800) 669-4000 (voice) or 800-669-6820 (TTY/TDD).

**Undue hardship.** A recipient must provide **reasonable accommodations** for qualified persons with disabilities, unless the accommodations requested would impose an **undue hardship** on the recipient. In general, the term **undue hardship** means *significant* difficulty or expense. The regulations implementing various Federal disability nondiscrimination laws list the factors that must be considered in deciding whether a particular accommodation would impose an **undue hardship**. In general, those factors include the following:

- **Type of accommodation** that has been asked for
- **Net cost of the accommodation** (taking into consideration the availability of tax credits and deductions, and/or outside funding, for the accommodation)

- **Overall size of the program** (including number of employees, number of participants, number and type of facilities, and size of budget)
- **Overall financial resources** of the program as a whole and the individual facility or facilities that would be involved with the accommodation
- **Effect** that providing the accommodation would have on the program or facility's ability to serve other customers (or, for a work-related accommodation, its employees' ability to perform their duties), and its ability to carry out its mission

**Fundamental alteration.** Recipients must make **reasonable modifications** to their policies, practices, and procedures when necessary to avoid discrimination against qualified people with disabilities, unless such modifications would cause a **fundamental alteration**.

Section 38.4 of the WIOA nondiscrimination regulations provides two alternate definitions for the term **fundamental alteration**:

- a change in the *essential nature* of a program or activity, or
- a cost that a recipient can demonstrate would result in an *undue burden*.

**The Formal Process** Under 29 CFR 38.8, a recipient must go through a formal process to determine whether a particular requested accommodation would cause **undue hardship**, or a particular requested modification would result in a **fundamental alteration**. The required process includes the following steps:

- The recipient must consider all of the factors listed in the definition of **undue hardship** or **fundamental alteration**, as appropriate, before determining whether to provide the requested accommodation or modification.
- If the recipient determines that the requested accommodation will cause an **undue hardship**, or that the requested modification would result in a **fundamental alteration**, it must take all of the following actions:

- Prepare a written statement of the reasons underlying the determination;
- Provide a copy of the statement of reasons to the person or persons who requested the accommodation or modification; and
- Take any other actions that will *not* cause undue hardship or result in a fundamental alteration, but that will enable the person(s) with a disability to receive the aid, benefits, services, training, or employment offered by the recipient, to the maximum extent possible.

Many people have the misconception that accommodations and modifications frequently impose undue hardships – that they require a program or employer to buy expensive equipment or make costly changes for participants or employees. The truth is that many accommodations and modifications are inexpensive and easy to provide.

## **ACTIVITY I: DISCRIMINATION / ACCOMMODATION / ACCESSIBILITY?**

### **Purpose:**

-  To identify what actions are appropriate in different disability-related situations

### **Task:**

- ✓ You are the EO Officer for the State of Independence. You have been asked to review the following cases and decide what the appropriate action would be.
- ✓ Read the descriptions on the following page. Decide which of the following actions, if any, are needed to comply with applicable legal requirements:
  - Policy change
  - Reasonable accommodation or modification
  - Change to accomplish architectural or programmatic accessibility
- ✓ Be prepared to explain your conclusions.
  -
- ✓ Share your findings with the class.

### **Time:**

- 🕒 10 minutes to read the descriptions and make your conclusions
- 🕒 10 minutes for the class discussion

**CASES:**  
**DISCRIMINATION / ACCOMMODATION/ACCESSIBILITY?**

1. A qualified individual with a disability (a physical impairment that requires the use of a wheelchair) applies for referral to an auto mechanic job.
2. An assessment center to which the employment service refers applicants for testing permits applicants with hearing impairments to bring their own interpreters if they cannot pay the \$5 interpreter fee.
3. A county program that provides services to eligible applicants has a lengthy and complex application process. When individuals with mental disabilities apply for services, they are unable to complete the application process successfully. No individual with a mental disability has been admitted to the program.
4. An intake center's front entrance is inaccessible and cannot be made accessible without substantial alterations to the front façade of the building. However, the rear service entrance can easily be made accessible.
5. A case manager refers all applicants with learning disabilities to a particular training program at a nearby college.
6. A WIOA applicant who needs a kidney transplant will be unable to attend training one day a week because of her dialysis schedule.

## COMMUNICATIONS

Recipients must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with persons without disabilities.



### Term to Know – Auxiliary Aids or Services

“Auxiliary aids or services” is a general, umbrella term that covers a wide range of devices, services, and actions used to communicate effectively with people with various types of disabilities.

For communicating with **people with hearing impairments**, the list of examples of possible auxiliary aids or services includes qualified interpreters, note-takers, transcription services, telephone handset amplifiers, telephones compatible with hearing aids, and closed-caption decoders.

For communicating the content of visually delivered materials to **people with visual impairments**, the list of examples of possible auxiliary aids or services includes qualified readers, taped texts, audio recordings, and brailled and large print materials.

### Effective communication with individuals with disabilities requires the following:

- The recipient must provide appropriate auxiliary aids or services where necessary to give people with disabilities an equal opportunity to participate in or benefit from a particular program or activity.
  - In determining what type of auxiliary aid or service is appropriate and necessary, the recipient must give primary consideration to the requests of the individual with a disability. This requirement acknowledges that not every method of communication will be effective for every person with the same broad, general type of disability, and that the best source of information about the most effective way to communicate with a particular person with a

disability is the person himself or herself.

- Where a recipient uses voice telephone to communicate by telephone, the recipient must also use telecommunication devices for individuals with hearing impairments (TDDs/TTYs), or equally effective communications systems, such as telephone relay services.
- The recipient must ensure that interested individuals, including individuals with visual or hearing impairments, can obtain information as to the existence and location of accessible services, activities, and facilities.
- A recipient must provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities.
  - The international symbol for accessibility must be used at each primary entrance of an accessible facility.

## **EMPLOYMENT PRACTICES AND EMPLOYMENT-RELATED TRAINING**

The WIOA nondiscrimination regulations, and DOL's regulations implementing Section 504 of the Rehabilitation Act, impose additional obligations that are related to recipients' employment practices, as well as their provision of employment-related training. Listed below are some of the more significant obligations.

### **Review of Job Qualifications and Selection Criteria (29 CFR 32.14)**

A recipient must develop, and adhere to, a schedule for reviewing the appropriateness of all job qualifications and all criteria used to determine eligibility for employment-related training. This review is to ensure that, where a job qualification or eligibility criterion excludes individuals with disabilities because of their disability, the qualification or criterion is genuinely related to the performance of the job or participation in the training, and is consistent with business necessity and safe performance.

## **Pre-Employment or Pre-Selection Inquires**

In the context of employment or providing employment related services and training, the types of disability-related inquiries that are permissible depend upon whether the questions being asked are made in the pre-selection or post-selection stage.

### ***Pre-Selection Stage***

In the pre-selection stage, recipients are generally prohibited from asking questions about disability. However, a recipient may invite applicants for employment or training to identify themselves as having a disability under the following limited circumstances:

- (1) The recipient must be either:
  - (a) taking remedial action to correct the effects of past discrimination,
  - (b) taking voluntary action to overcome the effects of conditions that resulted in limited participation in the recipient's Federally-assisted program or activity; or
  - (c) taking affirmative action pursuant to section 503 of the Rehabilitation Act
- (2) The recipient must state clearly on any written application form, or must make clear orally (if no written application form is used), that the disability-related information requested will be used solely in connection with the recipient's remedial action obligations or its voluntary or affirmative action efforts.
- (3) The recipient must state clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided by law (see 29 CFR 32.15(d)), that refusal to provide the information will not subject the applicant, employee or trainee to any adverse treatment, and that it will be used only in accordance with the law.

In addition, you may ask about an applicant's ability to perform specific functions necessary for the job or training program. For example, you may state the physical requirements of a job or training program (such as the ability

to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements. You may also ask applicants to describe or demonstrate how they would perform specific tasks, if the same questions are asked of all applicants.

You may also describe what the application process will involve and ask whether the applicant will need accommodations for the application process. If the applicant says yes, and the need for accommodation is not obvious, you may ask for reasonable documentation of a disability before you provide accommodations.

You may *not*, however, ask an applicant whether s/he will need reasonable accommodations to perform the essential functions of the job or meet the essential eligibility requirements of the training program, except under the following limited circumstances:

- the applicant has an obvious disability, and you reasonably believe that the applicant will need reasonable accommodation because of that obvious disability;
- the applicant has voluntarily disclosed to you that s/he has a hidden disability, and you reasonably believe that the applicant will need reasonable accommodation because of that hidden disability; or
- the applicant has voluntarily disclosed to you that s/he needs reasonable accommodation to perform the job or participate in the training program.

In these limited circumstances, although you may ask questions about the accommodations the job-seeker will need, you may *not* ask questions about the underlying medical condition.

### ***In the Post-Selection, Pre-Hire (or Pre-Training) Stage:***

You may ask disability-related questions and require medical examinations, even if they are unrelated to the job or the training program, as long as these conditions are met:

- All entering employees or trainees in the same category must be subjected to the same questions/exams, regardless of disability;
- The results of the questions or medical examinations are not used to impermissibly discriminate on the basis of disability; and
- All information obtained through these questions/ exams, as well as all other information about an individual's disabilities or medical conditions, is kept strictly confidential, as described below.

### **Confidentiality of Disability-Related or Other Medical Records**


WIOA recipients must keep disability-related records, and records containing medical information about particular individuals, confidential. This means that recipients must keep this information separate from other information about a particular individual, whether the information is maintained on paper or electronically.

The circumstances under which recipients may disclose medical information (including the fact that a particular individual has a disability) are extremely limited. Such information may be disclosed *only* to the following persons under the following circumstances:

- Supervisors, managers, and trainers may be informed about an employee's or trainee's disability, but only to the extent necessary in order to explain limitations on the employee's or trainee's activities, or to provide him or her with *reasonable accommodations*.
- First-aid and safety personnel may be informed about an employee's, applicant's, or trainee's medical condition, where appropriate, if the condition might require emergency treatment.
- Government officials investigating compliance with disability nondiscrimination laws must be given such information upon request.

## **ACTIVITY II: DISABILITY –RELATED INQUIRIES**

### **Purpose:**

-  To identify whether particular disability-related inquiries are lawful and appropriate

### **Task:**

- ✓ You are one of the members of the EO MOA review team for the State of Independence. As part of the documentation for Element 5, Independence has provided the attached memorandum from one of its LWSAs to the state EO Officer. The memorandum addresses the use of pre-employment medical inquiries.
- ✓ Individually:
  1. Evaluate the procedure using the training materials, the MOA Guidance, and the provisions of 29 CFR 32.15
  2. Identify the parts of the procedure, if any, that are inconsistent with the training materials, the MOA Guidance, or the requirements of 29 CFR 32.15; and
  3. For any part that is inconsistent, determine what changes should be made to correct the inconsistency.
- ✓ Within your small group, discuss your individual findings and come to a consensus on the changes that are required, if any.
- ✓ Select a spokesperson to report out.

### **Time:**

-  10 minutes to read the descriptions and make your conclusions

🕒 10 minutes for the group discussion

**MEMORANDUM FOR:** Martha Washington  
Equal Opportunity Officer, State of  
Independence

**FROM:** Benjamin Franklin  
Director, LWSA Grant Recipient

**SUBJECT:** Your Request for Information About Pre-  
employment Medical Inquiries

This memorandum is in response to your request for a description of our policies and procedures on the use of pre-employment medical inquiries within our local workforce service area. Let me assure you that our procedures are fully in compliance with the Americans with Disabilities Act. Feel free to include this memorandum in your Methods of Administration.

Our LWSA wants to ensure that the workers it hires are fully able to perform the work assigned. Therefore, the general health of potential employees is very important. However, it is also important to remember that local workforce service areas have very limited administrative budgets. Notwithstanding this, we have no questions about disability on the application form and the personnel office does not ask questions about disability.

The first step in the process is for an applicant to complete an employment application and file it with the Human Resources Clerk. While the applicant is in the office, the clerk reviews the application for completeness. Based upon her personal observation, the application is coded 1, 2, or 3. A “1” means that the applicant appears healthy, a “2” means that there may be some question as to the applicant’s health, and a “3” means that there is cause for concern, such as the applicant is blind, in a wheelchair or has some other problem. No specific inquiry about disability is made.

If the applicant is applying for a vacant position, appears to have the requisite qualifications, and is categorized a “1” or a “2”, an appointment with the Human Resources Managers is set up. (If a “3” is particularly well qualified, he or she might also be referred to the HR Manager.) At the meeting with the HR Manager, the qualifications of the applicant are discussed in detail.

As noted previously, the LWSA is very concerned about the health of its employees. We would like to be in a financial position to provide every potential employee with a physical examination. However, given our budget constraints, we cannot do that. We do provide physical examinations to those potential employees who appear to have health problems that would affect their work. While these exams are scheduled at the time of the HR Manager interview, they are not carried out until after the applicant has gone through the third step of the process, that of an interview with the head of the department in question.

The interview with the department head is the final stage of the process of selecting LWSA employees. Consistent with the ADA, we have instructed department heads to limit their discussions with applicants to the legitimate, non-medical qualifications for the job and how applicants meet those qualifications. Department heads are under strict instructions not to discuss disability issues with applicants under any circumstances.

The physical examination is conducted only after a “conditional offer of employment” is made by the department head. Again, this is in strict compliance with the ADA. The physician examines the applicant to determine their general health and to determine if the applicant has the physical and mental health needed to fully integrate himself or herself into the work setting. The results of the examination are then reviewed. It is extremely rare that we would not hire an applicant because of the medical examination.

You also asked about how we maintain confidentiality of medical records. Again, we have developed the policy to strictly conform to ADA requirements. Any record that contains medical information is maintained in a separate file. Electronic records are created in such a way that medical information in those files can be accessed only through a password. The records are made available only to supervisors and LWSA medical personnel.

## **SUPPORTING DOCUMENTATION: COMPLIANCE WITH FEDERAL DISABILITY NONDISCRIMINATION LAWS**

The regulations implementing Section 188 of the Workforce Innovation & Opportunity Act require the State to submit documentation that describes how the State ensures that recipients:

- Comply with the requirements regarding prohibited discriminatory actions based on disability
- Provide reasonable accommodation, reasonable modification, architectural accessibility and programmatic accessibility
- Evaluate job/selection qualifications on a planned schedule
- Limit pre-selection disability-related inquiries consistent with federal law
- Ensure confidentiality of disability-related and other medical information
- Communicate effectively with individuals with disabilities

This documentation should include copies of State and/or recipient policies and procedures dealing with disability issues, such as:

- Integrated settings
- Reasonable accommodation/modification
- Effective communication
- Architectural and programmatic accessibility
- Self-evaluations (forms and completed surveys) and descriptions of the status of corrective actions
- Training publications/agendas the State uses to raise awareness of disability issues

## **STATE'S IMPLEMENTATION OF MOA REQUIREMENTS RELATED TO COMPLIANCE WITH FEDERAL DISABILITY NONDISCRIMINATION LAWS**

This part of the training has been reserved to discuss the State's approach to implementing the MOA requirements related to Compliance with Federal Disability Nondiscrimination Laws. The State specialist will address the following:

- Policy communications and directives to LWVAs that instruct recipients on how to comply with 29 CFR 38.7-38.9, in the implementing regulations for Section 188 of WIOA, and Subparts B and C of 29 CFR part 32, in the implementing regulations for Section 504 of the Rehabilitation Act.
- Procedures and systems that support the State's implementation of these requirements.
- Additional MOA-related requirements that have been imposed by the State and that are related to Compliance with Federal Disability Nondiscrimination Laws.